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In the Supreme Court of the United States

OCTOBER TERM, 1980

GILBERT E. CALLOW, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
STANLEY S. SHAW, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of failure to file income tax returns where the forms that he filed with the Internal Revenue Service contained no information as to income or deductions but only various objections, asterisks, and the word "object."

2. Whether the district judge properly refused to disqualify himself for bias.

3. Whether the district court properly permitted petitioner to represent himself at trial.

4. Whether the evidence was sufficient to support petitioner's convictions for failure to file tax returns and filing false withholding tax forms.

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OPINIONS BELOW

The district court did not issue an opinion. The opinion of the court of appeals (Pet. App. 16-21) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1980. A petition for rehearing was denied on June 26, 1980. The petition for a writ of certiorari was filed on August 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of failing to file income tax returns for 1976 and 1977, in violation of 26 U.S.C. 7203, and of filing false forms W-4 or W-4E in 1976, 1977, and 1978, in violation of 26 U.S.C. 7205. The district court sentenced petitioner to a total of three years' imprisonment and imposed fines totalling $20,000.[1] The court of appeals affirmed per curiam (Pet. App. 16-21).

At the trial, petitioner offered no evidence in his defense. The government's evidence showed that during the years involved, petitioner received a civilian salary and retirement pay from the Air Force, in the amount of $16,070.64 for 1976 and $17,619 for 1977 (Tr. 62, 69). Instead of reporting these amounts on his income tax returns for those years, petitioner submitted Forms 1040 on which he either inserted the word "object" or asterisks

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[1]Petitioner was sentenced to consecutive one-year terms and a $10,000 fine on each count of failing to file returns. Petitioner was sentenced to an additional one-year term on each of three counts of filing false withholding forms. These terms were to be served consecutively to the terms imposed for failure to file, but concurrently with each other.

in the spaces calling for information as to income or deductions. Petitioner also wrote various objections in the margins of the forms (Exhs. 120, 123). For 1977, petitioner's objections included the explanation that the asterisk was used because the "figure is not expressed in U.S. Dollars as I understand that term" (Exh. 123). Despite his receipt of taxable income during the years involved, petitioner filed separate withholding exemption certificates in 1976 and 1978 with Air Force Retired Pay Operations, stating that he had no federal income tax liability for 1975 and 1977. In 1977, petitioner filed a similar form with his current employer, stating that he had no income tax liability for 1976. These withholding forms, like his Forms 1040, were accompanied by petitioner's objections (Exhs. 16, 33, 34).

ARGUMENT

1. The courts below correctly held that the Forms 1040 petitioner filed for 1976 and 1977 were not valid returns within the meaning of Section 7203 of the Internal Revenue Code (26 U.S.C.). It is well established that the act of filing a Form 1040 does not by itself satisfy the requirement of filing a tax return for the purposes of Section 7203. "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code." *United States* v. *Porth*, 426 F. 2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970). The courts of appeals have relied on *Porth* in numerous instances where the taxpayer, in an act of protest, refused to supply information relating to his income.[2]

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[2]See, *e.g.*, *United States* v. *Edelson*, 604 F. 2d 232, 234 (3d Cir. 1979); *United States* v. *Stout*, 601 F. 2d 325, 328-329 (7th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Brown*, 600 F. 2d 248, 251 (10th Cir. 1979); *United States* v. *Pryor*, 574 F. 2d 440 (8th Cir.

Plainly, petitioner intended the forms he filed to be a protest against the federal income tax. In no sense did petitioner file forms purporting to disclose his income that was subject to tax. Since petitioner made no real attempt to comply with the requirement of filing a return, the court of appeals properly rejected his claim as "legally insubstantial" (Pet. App. 21) and affirmed his conviction for failure to file.

2. Petitioner argues (Pet. 3) that the decision below conflicts with *United States* v. *Long*, 618 F. 2d 74 (9th Cir. 1980). There, the taxpayer filed Forms 1040 on which he had inserted zeros in the spaces calling for number of exemptions and amounts of income, tax, and tax withheld. He also attached a copy of a tax protest tract to his Form 1040. On these facts, the court of appeals reversed a conviction for failure to file tax returns on the ground that the zeros entered on the forms constituted information from which the tax could be computed. As the court saw the matter, "The I.R.S. could calculate assessments from Long's strings of zeros, just as it could if Long had entered other numbers. The resulting assessments might not reflect Long's actual tax liability, but some computation was possible" (618 F. 2d at 75). On this basis, the court distinguished the case from *Porth* and similar cases in which the defendants failed to complete tax forms or left them blank (618 F. 2d at 75-76).

1978); *United States* v. *Dillon*, 566 F. 2d 702 (10th Cir. 1977); *United States* v. *Irwin*, 561 F. 2d 198 (10th Cir. 1977), cert. denied, 434 U.S. 1012 (1978); *United States* v. *Hoopes*, 545 F. 2d 721 (10th Cir. 1976), cert. denied, 431 U.S. 954 (1977); *United States* v. *Silkman*, 543 F. 2d 1218, 1219 (8th Cir. 1976), cert. denied, 431 U.S. 919 (1977); *United States* v. *Jordan*, 508 F. 2d 750, 752 (7th Cir.), cert. denied, 423 U.S. 842 (1975); *United States* v. *Klee*, 494 F. 2d 394, 397 (9th Cir.), cert. denied, 419 U.S. 835 (1974); *United States* v. *Radue*, 486 F. 2d 220 (5th Cir. 1973), cert. denied, 416 U.S. 908 (1974); *United States* v. *Daly*, 481 F. 2d 28 (8th Cir.), cert. denied, 414 U.S. 1064 (1973).

Although the court in *Long* held that the government did not prove the defendant guilty of failure to file, it observed that the government might have sustained some other charge (presumably a charge of filing a false return) (*id.* at 76).

We question the soundness of the ruling in *Long* that the Internal Revenue Service could calculate tax liability from the zero entries so that the defendant's form in that case met the return filing requirements. But contrary to petitioner's contention, the facts of this case are not sufficiently comparable to *Long* to establish a conflict in the circuits. While the defendant in *Long* simply entered zeros on his Form 1040, here petitioner entered no numbers on his forms from which his tax arguably could be computed. To the contrary, he simply entered various objections, asterisks, or the word "object". There was no way the Internal Revenue Service could have computed his tax liability. Indeed, this case is comparable to one in which this Court recently declined review. See *United States* v. *Smith*, 618 F. 2d 280 (5th Cir.), cert. denied, No. 79-6894 (Oct. 6, 1980). There, the defendant reported on his form that he had "Less than $750.00 constitutional dollars as defined by the U.S. Constitution" and that "$ is used to indicate constitutional dollars (gold or silver coin)" (79-6894 Pet. 4). Similarly, petitioner here reported that he received no "constitutional" dollars—not that he had no "income" as that term is used in connection with federal income tax returns. See *United States* v. *Edelson*, 604 F. 2d 232 (3d Cir. 1979); *United States* v. *Brown*, 600 F. 2d 248, 251 (10th Cir. 1979). As in *Smith*, the court below therefore correctly affirmed petitioner's conviction for failure to file a return from which his tax could be computed.

3. Petitioner also argues (Pet. v-viii) that the district judge was biased and contends (Pet. viii, 3-4) that the penalties imposed violate due process and constitute cruel and unusual punishment. For the most part, petitioner's complaints relate to the sentencing proceedings.[3] The record shows, however, that the district judge at all times treated the petitioner fairly. Any remarks made at sentencing that may indicate the judge's disapproval of petitioner's activities (Pet. v-viii) were clearly based upon information acquired during trial and indicate no unfair bias. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Bobo*, 586 F. 2d 355 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); *United States* v. *Bernstein*, 533 F. 2d 775 (2d Cir. 1976).[4]

Finally, although the district judge stated to petitioner that "[t]he sentence I am about to impose is much harsher than the offense requires" (Pet. vi, viii, 4, Pet. App. 12), the sentence imposed was well within the statutory limits

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[3]Petitioner also complains (Pet. vi-vii) that the district court refused to reduce the $50,000 appeal bond, but he fails to show the full cooperation with probation authorities that the court required before reducing the $50,000 bond. Moreover, petitioner has not shown that he sought reduction of this bond in the court of appeals, as is required by Fed. R. App. P. 9(b), nor has he shown any other reason to disregard the "great deference" that is ordinarily given to the district judge's determination of the amount of a bond. *Mecom* v. *United States*, 434 U.S. 1340, 1341 (1977) (Powell, Circuit Justice).

[4]Petitioner's citation of newspaper articles (Pet. v; Pet. App. 30-31) that indicate that the district judge withdrew from another tax protestor case fails to demonstrate the personal bias against petitioner required by 28 U.S.C. 455 to require recusal. See *United States* v. *Gigax*, 605 F. 2d 507 (10th Cir. 1979), where the court rejected similar charges made against the same judge in another tax protestor case. Cf. *Lawton* v. *Tarr*, 327 F. Supp. 670 (E.D. N.C. 1971).

and thus is not subject to attack upon review. *Dorszynski* v. *United States*, 418 U.S. 424, 431, 440-441 & n.14, 443 (1974); *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); *United States* v. *Lamont*, 565 F. 2d 212, 220 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978).[5]

4. Petitioner further contends (Pet. i-ii) that the district court erred in failing to explore the extent of his education or his ability to conduct his own defense before allowing petitioner to represent himself at trial. The district court, however, was only required to ascertain that petitioner manifested a "knowing exercise" of his right to represent himself. *Faretta* v. *California*, 422 U.S. 806, 836 (1975). Here, the record demonstrates that petitioner resisted the repeated warnings of the magistrate and two district judges to engage a lawyer[6] and instead chose to conduct his own defense, assisted by a lay advisor who, with the district court's permission, sat with petitioner. In choosing to proceed *pro se*, petitioner made an informed choice and knew the consequences of his

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[5]At sentencing, the district judge advised petitioner that he would modify the sentence if petitioner later cooperated with probation authorities (Pet. App. 12). Subsequently, when petitioner finally appeared with counsel at a hearing on the setting of an appellate bond, the district judge pointedly told petitioner's counsel that a Rule 35 motion should be filed, and that the court would act upon such a motion after the appellate process (Transcript of Hearing on Appeal Bond 124).

[6]See, *e.g.*, Transcript of Pre-trial Proceedings on November 2, 1979, at 4-6; Pet. App. 14; Transcript of Hearing on Appeal Bond 5-6, 56-57.

actions. *United States* v. *Brown*, 591 F. 2d 307, 310 (5th Cir. 1979); *United States* v. *Richardson*, 588 F. 2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979).[7]

Petitioner's assertion (Pet. iii) that the evidence was insufficient is effectively refuted by the government's prima facie case. In order to convict for violations of Section 7203 and 7205, the government was only required to show that petitioner voluntarily and intentionally violated a known legal duty to file proper tax returns and to provide correct withholding information. *United States* v. *Pomponio*, 429 U.S. 10 (1976). To prove its case, the government produced the testimony of payroll officials who showed that petitioner had received sufficient gross income during the years in question to require him to file tax returns and that petitioner had filed withholding forms which falsely stated that he had incurred no tax

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[7]Petitioner did not raise the denial of counsel issue in the district court or in the court of appeals. It is therefore not properly before this Court. *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957); see also *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). Moreover, although petitioner urges (Pet. i) that he could not afford counsel on appeal because his house was encumbered as security for his bond, he does not explain why he could not have paid an attorney from his current income. See Transcript of Hearing on Appeal Bond 55-56.

Finally, petitioner complains (Pet. i-ii) that he had no counsel in preparing this petition. But petitioner acknowledges (*ibid.*) that he did have legal counsel but that he was dissatisfied with the petition that his counsel prepared. There is nothing to indicate why petitioner could not have obtained other counsel to prepare a satisfactory petition. At all events, there is no constitutional right to appointed counsel in seeking review by this Court of a criminal conviction. See, generally, *Ross* v. *Moffitt*, 417 U.S. 600, 616-618 (1974). While the courts of appeals as a matter of practice may appoint counsel to represent indigents on criminal appeals, including the filing of a petition for certiorari in this Court, petitioner made no showing of indigency as required by 18 U.S.C. 3006A, and did not apply for such appointed counsel.

liability in the years immediately prior to the years in which the forms were filed (Tr. 18-22, 23-30, 34-39). The government also produced an Internal Revenue Service employee who, relying upon evidence before the jury as to petitioner's income and deductions in 1975, 1976 and 1977, reconstructed his taxable income and showed that petitioner was required to file a return for the years in question (Tr. 59-70). The government also introduced petitioner's earlier proper returns, showing that he knew of his obligations to file and to produce correct withholding information (Exhs. 115, 116, 117), and it introduced the false withholding exemption forms and the improperly filed Forms 1040 for the years in question (Exhs. 16, 33, 34, 120, 123). This evidence was more than sufficient to convict petitioner of failure to file and filing false withholding forms. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

Contrary to petitioner's further contention (Pet. ii), the government was not required to show that he posed any substantial degree of harm to society, nor was it required to overcome any evidence which petitioner might have produced in his defense but did not (see Pet. iii). Here, petitioner did not contest the government's evidence; in failing to do so, he assumed the risk that the jury would find against him. *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954).[8]

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[8]Petitioner attacks (Pet. iv-v) the introduction of evidence as to his state tax returns. But the court's order authorizing disclosure of such material was not improper, especially where the relevant statute permits disclosure "in accordance with judicial order." Colo. Rev. Stat. § 39-21-113(4)(a) (1973).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
STANLEY S. SHAW, JR.
Attorneys

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